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Between Rock and a hard place? No consideration from the Supreme Court in *Rock Advertising Ltd. v MWB Business Exchange Centres Ltd.* [2018] UKSC 24

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Cases: *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24.
Williams v Roffey Bros & Nicholls (Contractors) Ltd. [1991] 1 QB 1 CA (Civ Div).
Foakes v Beer (1884) 9 App Cas 605.
MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2016] EWCA Civ 553 at [14].
Stilk v Myrick 170 E.R. 1168; (1809) Camp. 317.
Hartley v Ponsonby 119 E.R. 1471; (1857) 7 El. & Bl. 872.
South Caribbean Trading Ltd v Trafigura Beheer BV [2004] EWHC 2676.
Pinnel's Case 77 E.R. 237; (1602) 5 Co. Rep. 117a.
Re Selectmove Ltd [1995] 1 W.L.R. 474 CA (Civ Div).
Beatty v Guggenheim Exploration Company (1919) 225 NY 330, 337-388 at [7].
Globe Motors Inc v TRW LucasVarity Electric Steering Ltd [2016] EWCA Civ 396 168 Con LR 59.
Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130.
Pao On v Lau Yiu Long [1980] AC 614.
North Ocean Shipping Co v Hyundai Construction, The Atlantic Baron [1978] 3 All ER 1170.
B & S Contracts and Design Ltd v Victor Green Publications Ltd [1984] ICR 419.
Atlas Express v Kafco [1989] QB 833.
CTN Cash and Carry Ltd v Gallaher [1994] 4 All ER 714.
Times Travel (UK) Ltd v Pakistan International Airlines Corp [2017] EWHC 1367 (Ch).
Greater Fredericton Airport Authority Inc v NAV Canada (2008) 290 D.L.R. (4th) 405 (CA (NB)).
Antons Trawling Co Ltd v Smith [2003] 2 N.Z.L.R. 23 (CA (NZ)).
Yam Seng Pte Ltd v International Trade Corporation Ltd [2013] EWHC 111 (QB)
Adam Opel GmbH v Mitras Automotive (UK) Ltd Costs [2007] EWHC 3481 (QB).
Shogun Finance Ltd v Hudson [2003 UKHL 62; [2004] 1 All ER 215.

Abstract: This article analyses the Supreme Court decision in *Rock Advertising Limited v MWB Business Exchange Centres Limited* and the likely commercial impact on No Oral Modification clauses and the distinction between promises to pay more/promises to accept less in the doctrine of consideration. The article suggests that in respect of the latter, this was a missed opportunity and suggests some potential ways forward.

Introduction

In *Rock Advertising Limited v MWB Business Exchange Centres Limited* (*Rock v MWB*)¹, the Supreme Court (SC) were given the opportunity to examine the validity of “No Oral Modification” (NOM) clauses and whether an agreement to pay less or pay later is supported by consideration. Lord

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¹ *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24.

Sumption, delivering the lead judgment, states that this appeal is “exceptional”, given that “[M]odern litigation rarely raises truly fundamental issues in the law of contract”². It is therefore not an exaggeration to say that this decision has been much anticipated by commentators, particularly regarding the anticipated review of the anomalous *Williams v Roffey Bros & Nicholls (Contractors) Ltd.* (*Williams v Roffey*)³ and *Foakes v Beer*⁴ promises to pay more and promises to accept less distinction regarding modification of contractual agreements. Commentators have noted the deficiencies in English law in this area⁵ and might go further than Lord Sumption’s reflection that this is “*probably* [our emphasis] ripe for reexamination”⁶, to say that this is an area “ripe for reexamination” and that in declining to rule on the consideration point or provide *obiter* guidance, the court has missed an opportunity. Saying that, the ruling on the NOM clause is interesting from an academic perspective and arguably useful from a commercial perspective and this article will explore the reasoning and implications of this. This article explores some possible paths the SC could have taken in response to the Court of Appeal’s ruling on the consideration point, namely endorsing the part-payment of debt/promise to pay more distinction; extending the practical benefit concept to part-payment of debt; and elevating the doctrine of economic duress to replace the doctrine of consideration in contractual modification.

Factual background and grounds of appeal

Rock Advertising Ltd (the respondent) entered into a licence agreement with MWB Business Exchange Centres Limited (the appellant) to occupy office space for 12 months. The contract contained a clause which provided that ‘all variations to this licence must be agreed, set out in writing and signed on behalf of both parties before they take effect’.⁷ Rock accumulated arrears of licence fees, so a director of Rock proposed a revised schedule of payments. The proposal meant that some payments would be deferred, and the arrears would be spread over the remainder of the licence term. This revision would be worth slightly less to MWB. There was a dispute as to whether MWB orally accepted this proposal. Thereafter MWB locked Rock out of the premises, terminated the agreement and sued for arrears. Rock counterclaimed damages for wrongful exclusion from the premises.

Judge Moloney QC sitting in the Central London County Court, held that MWB were entitled to claim the arrears. He found that although the parties had agreed to the revised schedule, the oral variation did not satisfy the requirements of the original clause in the contract (clause 7.6) in that it was not in writing and signed on behalf of both parties. On the consideration point, he held that the variation agreement was supported by consideration because it brought practical advantages to MWB, those advantages being the commercial benefit to MWB in retaining an existing tenant; the hope of perhaps recovering its arrears; and avoiding allowing the property to stand empty for some time at further loss.⁸

² *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 at [1].

³ *Williams v Roffey Bros & Nicholls (Contractors) Ltd.* [1991] 1 QB 1 CA (Civ Div).

⁴ *Foakes v Beer* (1884) 9 App Cas 605.

⁵ See e.g. A. Shaw-Mellors & J. Poole, “Recession, changed circumstances, and renegotiations: the inadequacy of principle in English law” (2018) 2 *Journal of Business Law* 101-121 and A. Boon Leong Phang, “Consideration at the crossroads” (1991) 107(Jan) *Law Quarterly Review* 21-24.

⁶ *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 at [18].

⁷ Clause 7.6.

⁸ *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553 at [14].

Rock appealed and the Court of Appeal (Arden, Kitchin and McCombe LJ) overturned the first instance decision, finding that MWB were bound by the variation and not entitled to claim the arrears at the time when they did. On the oral variation point, the appeal court considered the oral agreement to revise the schedule of payments also amounted to an agreement to dispense with clause 7.6. This indicates that the clause (which purported to prohibit variation of the contract by oral agreement) was capable of variation by the parties by oral agreement. In relation to the consideration issue, the Court of Appeal agreed with the court below that the variation was supported by consideration.

MWB appealed to the Supreme Court on two issues: (i) whether a No Oral Modification (NOM) clause (a contractual term precluding amendment of an agreement other than in writing) is legally effective; and (ii) whether the variation of an agreement to pay money, by substituting an obligation to pay either less money or the same money later, is supported by the necessary consideration.

Common law backdrop to contractual variations

In relation to the consideration point in contractual variations, the common law makes a distinction between variations which (i) promise to pay more for performance of an existing contractual duty and (ii) those which vary an agreement to pay money, by substituting an obligation to pay less money (or the same money later).

The law relating to the first situation is that performance of an existing contractual duty does not amount to good consideration (*Stilk v Myrick*)⁹ unless the person does more than their existing duty (*Hartley v Ponsonby*).¹⁰ However, in *Williams v Roffey* the court *did* enforce a promise made by Roffey Bros to pay Williams an extra sum of money for work which he was already under a pre-existing contractual duty to perform. The facts of the case put briefly are that Roffey Bros (RB - the defendant) entered into a contract with the owners to refurbish a block of flats and the contract contained a clause stating that if the flats were not refurbished in time, then a sum of money was payable. RB entered a second contract with Williams (the claimant) to carry out the carpentry work. During performance RB became aware that Williams had underestimated the cost of the work and varied the contract so that one flat was finished at a time and RB promised to pay Williams a further sum for each completed flat. The court enforced the promise to pay more money for a pre-existing contractual duty, because they found that RB had received a practical benefit from the variation in that RB would avoid a penalty clause and they also benefited from not having to find another carpenter and having a more structured payment scheme. The court took the view that practical benefits such as these could amount to consideration, with a focus being that there had not been any duress applied. The implication is that pre-*Williams v Roffey* contractual variations to pay more money for an existing contractual duty would be unlikely to have been enforceable for lack of consideration, whereas post-*Williams v Roffey* the variation may be enforceable if there is a practical

⁹ *Stilk v Myrick* 170 E.R. 1168; (1809) Camp. 317.

¹⁰ *Hartley v Ponsonby* 119 E.R. 1471; (1857) 7 El. & Bl. 872.

benefit. Commentators have generally welcomed the decision as reflecting commercial reality,¹¹ although not everyone concurs.¹²

Turning to the second situation, which involves varying an agreement to pay money, to substitute an obligation to pay less money (or the same money later), traditionally this area of the law ran along similar lines to that outlined above, in that part-payment of a debt was not held to be sufficient consideration (*Foakes v Beer*)¹³. In *Foakes v Beer*, the House of Lords approved the rule in *Pinnel's Case*¹⁴ that "payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole". The rule in *Pinnel's* is restricted in that if the debtor does something different, in that they pay earlier, or something extra ("the gift of a horse, hawk or robe"), then it can amount to good consideration.

The question therefore became, could the 'practical benefit' concept adopted in *Williams v Roffey* apply to this situation, namely part-payment of a debt. In *Re Selectmove*¹⁵, the Court of Appeal had the opportunity to provide an answer, and the answer was emphatically no. The case concerned a company which owed the Inland Revenue money. It was proposed that the company would pay any future liability as it fell due and would pay the outstanding tax in monthly instalments, but the court found this agreement was unenforceable for lack of consideration. Counsel for the company specifically argued that the Inland Revenue stood to gain practical benefits. Peter Gibson LJ said:

"If the principle of *Williams v Roffey* is to be extended to an obligation to make payment, it would in effect leave the principle in *Foakes v Beer* without any application. When a creditor and a debtor who are at arm's length reach agreement on the payment of the debt by instalments to accommodate the debtor, the creditor will no doubt always see a practical benefit to himself in so doing...it is in my judgment impossible, consistently with the doctrine of precedent, for this court to extend the principle of *Williams's* case to any circumstances governed by the principle of *Foakes v Beer*".¹⁶

This common law backdrop therefore identifies why one of the issues before the SC in *Rock Advertising v MWB* (whether a variation of an agreement to pay money, by substituting an obligation to pay less money/some money later, is supported by the necessary consideration) was so timely and of such practical importance to the commercial world.

Supreme Court decision

i. Validity of a Non Oral Modification (NOM) clause

Given that the entirety of the judgment except for one paragraph examines this issue, the reasoning and divergence, albeit of limited significance, between Lord Sumption and Lord Bridge needs to be explored. The issue centres on whether parties can bind themselves in respect of future contractual

¹¹ See for example: R. Halson, "Sailors, sub-contractors and consideration" (1990) 106 *Law Quarterly Review* 184, where the shift of emphasis from consideration to duress was described as welcomed.

¹² *South Caribbean Trading Ltd v Trafigura Beheer BV* [2004] EWHC 2676, Colman J was critical of the ruling. See also A. Blair and N. Hird, "Minding your own business - *Williams v Roffey* re-visited: consideration re-considered" (1996) *Journal of Business Law* 256, where practical benefit was described as illusory.

¹³ *Foakes v Beer* (1884) 9 App Cas 605 HL.

¹⁴ *Pinnel's Case* 77 E.R. 237; (1602) 5 Co. Rep. 117a.

¹⁵ *Re Selectmove Ltd* [1995] 1 W.L.R. 474 CA (Civ Div).

¹⁶ *Re Selectmove Ltd* [1995] 1 W.L.R. 474 CA (Civ Div) at [481].

variations via a clause which specifies the form which any such variation must adhere to, in this case, clause 7.6 which specified that any variation must be in writing and signed by both parties. The reasons invariably given against the effectiveness of such clauses, Lord Sumption states, are that because English common law does not, with the exception of certain statutory provisions, require a contract to be in a particular form, the parties may agree to remove any requirements they have imposed on themselves and that agreement does not have to be in the form originally prescribed. Putting into context, Counsel for Rock submitted, just because clause 7.6 specified certain requirements for variation, this did not preclude variation by other means i.e. here the oral agreement between Mr Idehen and Ms Evans in respect of the revised payment schedule effectively rendered clause 7.6 redundant.

The judgment sets out the traditional position as made by Cardozo J in *Beatty v Guggenheim Exploration Co*:

“Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived.”¹⁷

Whilst acknowledging the long-standing support for this approach in other jurisdictions¹⁸ alongside that of English law,¹⁹ Lord Sumption notes that “[O]n the other side of this debate, there is a substantial body of recent academic writing which would give effect to No Oral Modification clauses according to their terms”²⁰. He then proceeds to set out his stall in the following paragraph, stating “[I]n my opinion the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation”. Arguably, although the lack of exploration of the consideration point discussed below is disappointing, the development in this area is significant.

Tackling the implications of the CA’s decision in *MWB v Rock*, namely that no matter how clearly expressed parties’ intentions are, they cannot bind themselves as to the form of any future variations, Lord Sumption disagrees with the key argument set out by Lord Justice Kitchin that this would negate the parties’ autonomy, providing the counterargument that:

“[T]he real offence against party autonomy is the suggestion that they cannot bind themselves as to the form of any variation, even if that is what they have agreed.”²¹

Recognising that NOM clauses are commonly found in written contracts, Lord Sumption sets out the commercial reasons for including them, namely to avoid misunderstandings which may arise from an oral agreement and to ensure that it is only those with authority who can make such agreements.²² Lord Briggs makes the salient point that it Mr Idehen and Ms Evans were “probably entirely unaware” of clause 7.6²³ and that their purported agreement was analogous to negotiations subject to contract, rather than Lord Sumption’s comparison with entire agreement clauses, i.e. in this case that the agreement would not take effect until drawn up as per clause 7.6 unless there has been express agreement to dispense with those formalities. If the CA’s ruling on the validity of clause 7.6 had been upheld, this would mean as O’Sullivan neatly puts it, “that the disputed oral variation,

¹⁷ *Beatty v Guggenheim Exploration Company* (1919) 225 NY 330, 337-388 at [7].

¹⁸ Jurisdictions in the USA; Canada; Australia and Germany *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 at [4].

¹⁹ *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 at [8].

²⁰ *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 at [9].

²¹ *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 at [11].

²² *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 at [12].

²³ *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 at [24].

made on a bus by mobile phone, prevailed - cl. 7.6 was not worth the (signed) paper it was written on.”²⁴ Recognising arguments on both sides,²⁵ recently considered in *Globe Motors Inc v TRW LucasVarity Electric Steering Ltd*²⁶, which came down on the side of such a clause being ineffective in the face of an oral variation, though this was an *obiter* discussion, O’Sullivan makes the strong point that although “[T]he unfettered sovereignty argument is formidable”, “[T]here is something paradoxical about freedom of contract being invoked to deny effect to a sensible contractual clause.”²⁷ Or, as Lord Sumption puts it “the law of contract does not normally obstruct the legitimate intentions of businessmen”, except for reasons of public policy, of which there are none in this case.²⁸

Given that this decision is unequivocal in its recognition of the validity of NOM clauses, Lord Sumption takes pains to counter the, as he puts it, “entirely conceptual” argument that because there are no formal requirements for contract formation, parties may not bind themselves as to the form of future variations because freedom of contract would mean that any agreement, however informal, would undo the prior one. He sets out where, as he puts it, this circle has been squared²⁹ and states that

“These widely used codes suggest that there is no conceptual inconsistency between a general rule allowing contracts to be made informally and a specific rule that effect will be given to a contract requiring writing for a variation.”³⁰

Whilst Lord Bridge substantively concurs with Lord Sumption, he disagrees with the reasoning that not to recognise NOM clauses would override the parties’ intentions so that it would not be possible for them to bind themselves as to the form in which to achieve a variation in the future, stating instead that:

“For as long as either (or any) party to a contract containing a NOM clause wishes the NOM clause to remain in force, that party may so insist, and nothing less than a written variation of the substance will suffice to vary the rest of the contract (leaving aside estoppel).”³¹

The distinction is however he notes unlikely to “have any significant consequences for the application of the common law, save perhaps on very unlikely facts.”³²

The commercial implications of this decision are discussed below; however, it is interesting at this point to note the consideration Lord Sumption gives to the safeguard of reliance where a party performs in accordance with a purported variation believing it to be valid. This is set out in both the

²⁴ J. O’Sullivan, “Unconsidered modifications” (2017) 133(Apr) *Law Quarterly Review* 191, 196.

²⁵ See e.g. *Chitty on Contracts*, 32nd edition, 2015, para 22-04 fn 196 that the “better view” is that NOM clauses are non-binding, cited in O’Sullivan n36 at 196.

²⁶ *Globe Motors Inc v TRW LucasVarity Electric Steering Ltd* [2016] EWCA Civ 396 168 Con LR 59.

²⁷ n35.

²⁸ *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 at [12].

²⁹ The Vienna Convention on Contracts for the International Sale of Goods, 1980, as ratified by 89 states, but not the UK, articles 11 and 29(2) and the UNIDROIT Principles of International Commercial Contracts, 4th edn, 2016 article 2.1.18, *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 at [13].

³⁰ *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 at [13]. The judgment proceeds to address the issue in relation to collateral contracts, which we do not have scope to discuss here.

³¹ *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 at [25].

³² *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 at [20].

Vienna Convention and UNIDROIT principles, meaning that reasonable reliance may preclude a party from relying on the original clause.³³

ii. Establishing consideration in an agreement to pay less or pay later

Ruling that by failing to comply with the formalities specified in clause 7.6 of the licence agreement, the oral variation was invalid, meant that the SC felt it “unnecessary to deal with consideration”.³⁴ Nevertheless, although consideration is only discussed in one paragraph, this paragraph succinctly identifies the issues. In part accepting the CA’s decision in *MWB v Rock*³⁵ that having the premises occupied and increasing the likelihood of payment if the sums owed were deferred, Lord Sumption acknowledges the “practical value”, not interestingly the wording of *Williams v Roffey* “practical benefit” whilst noting that “neither was a contractual entitlement”, which looks rather like dancing on the head of a pin. The problem with the commercial advantage as consideration argument is, and long has been, *Foakes v Beer*, in particular Lord Sumption notes, the comments of Lord Blackburn³⁶ and the CA decision in *Re Selectmove*³⁷ which declined to follow *Williams v Roffey*. Accepting the “arguable points of distinction”³⁸, we would agree that “the arguments are somewhat forced”³⁹ and would, as discussed above, have liked to see exploration of this issue. This will have to wait though, as the SC states this will need to be before a full panel and as *ratio decidendi* rather than *obiter dictum*.

Possible paths for contractual modifications

There are a number of ways forward for resolving the consideration issue in relation to contractual modifications. Here, we focus on three possible approaches, endorsing the existing distinction between promises to pay more and part payment of debt situations; extending the practical benefit concept into the part payment of debt arena; or thirdly elevating the doctrine of duress.

i. Endorsing the promise to pay more/part-payment of debt distinction

One way forward, and arguably the one adopted at present in view of the SC’s limited discussion of the consideration point, is to retain the distinction between promises to pay more (as in *Williams v Roffey*) and promises to accept less (as in *Foakes v Beer*). Why might this approach be desirable?

One reason is that arguably, whilst difficult to justify conceptually, the principle works tolerably well in practice, partly because the strictness of the rule is mitigated by two areas. The first is that by not

³³ *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 at [16]. Lord Sumption notes the use of estoppel in English law, but does not explore that here, other than to state that the lower courts had rightly found that Rock Advertising had not acted in a way sufficient to invoke estoppel and that “the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the Non Oral Modification clause.”

³⁴ *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 at [18] per Lord Sumption.

³⁵ *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553.

³⁶ *Foakes v Beer* (1884) 9 App Cas 605 at 622.

³⁷ *Re Selectmove* [1995] 1 WLR 474.

³⁸ *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 at [18] per Lord Sumption.

³⁹ *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 at [18].

applying practical benefit to part payment of debt, a person can still ensure that his variation is enforceable by simply giving something extra (“a horse, hawk or robe”), thereby showing intention to make the variation legally binding.⁴⁰ A second means of preventing injustice is the doctrine of promissory estoppel (a similar point was made by Lord Sumption about estoppel safeguarding against injustice in relation to NOM clauses).⁴¹ Promissory estoppel operates where there is a pre-existing contractual relationship; a clear and unequivocal promise or representation is made; there is reliance on the promise; and it would be inequitable for the promisor to go back on the promise. In this way promissory estoppel can prevent a person going back on their promise to accept less in certain circumstances. Following this line of argument, rather than extending the law of practical benefit to part payment of debt, the way forward may be to retain the existing distinction regarding consideration and use the doctrine of promissory estoppel as a back-up. This potential increase in the significance of promissory estoppel may be welcomed: Treitel, for example, notes promissory estoppel as an important and prominent area of contract law.⁴² The advantage of this approach is that it sits well within contractual renegotiations, so rather than changing the law English law would have a body of authority sitting behind it. A further potential advantage of retaining *Foakes v Beer*, with promissory estoppel as a safeguard, is that the duress issue would be dealt with under the ‘inequitable to go back on promise’ point, which may go some way to alleviating concerns about elevating the doctrine of duress which is discussed below.

A further reason for potentially retaining a distinction between promises to pay more/accept less is that arguably the practical benefit concept itself is flawed and uncertain and so it is right not to extend it to such a key area for commerce as part payment of debt. Indeed, Lord Sumption noted during the hearing that “the extra speed of work, wasn’t itself a contractual variation, so although there was a practical benefit, there was no contractual benefit. The argument is that only contractual benefits can amount to consideration”.⁴³ This appears to differ from commentators’ viewpoints, who have noted that there are *two* different definitions of consideration; factual and legal,⁴⁴ with *Williams v Roffey* adopting a factual definition of consideration. This doubt over the practical benefit/contractual benefit issue could indicate that such an uncertain concept should not be extended. A further potential problem with *Williams v Roffey* (raised by counsel for the appellant) is that consideration has to be present as at the date of the variation, whereas in that case, at the date of variation the contractor only promised what he was contracted to do - the practical benefit relates to performance (including avoiding the penalty clause).⁴⁵

Despite these potential advantages, the current state of affairs has led to adverse commentary. Shaw-Mellors argues “the consequence of *Roffey* appeared to be an anomalous difference in treatment between promises to pay more (a practical benefit was valid consideration) and promises to accept less.”⁴⁶ Roberts notes “there was little logically to commend in an approach to variation contracts that viewed a practical benefit as being good consideration for an agreement to pay more,

⁴⁰ Counsel for the appellant made this point in the Supreme Court: *MWB v Rock Advertising*, UKSC 2016/0152 at the hearing 1 February 2018.

⁴¹ *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 at [16]: “In England, the safeguard against injustice lies in the various doctrines of estoppel”.

⁴² G. Treitel *Some Landmarks of Twentieth Century Contract Law* (Oxford: Oxford University Press, 2002).

⁴³ Lord Sumption, *MWB v Rock Advertising*, UKSC 2016/0152 at the hearing 1 February 2018.

⁴⁴ R. Halson, “Sailors, sub-contractors and consideration” (1990) 106 *Law Quarterly Review* 183.

⁴⁵ Although Lord Sumption disagreed with this point at the hearing, as he said that it simply meant attaching value to an expectation at the time of the variation.

⁴⁶ A. Shaw-Mellors & J. Poole, “Recession, changed circumstances, and renegotiations: the inadequacy of principle in English law” (2018) 2 *Journal of Business Law* 101, 107.

but that held that a practical benefit was not good consideration when the agreement was to accept less.”⁴⁷ Arguably, this distinction is difficult to justify conceptually. Writing in 1994 following the *Re Selectmove Ltd* decision, Peel argued that the least attractive option is to do nothing. He noted that the confirmation of *Foakes v Beer* alongside *Williams v Roffey*, means that the “question of whether a promise to perform an existing obligation owed to the promisee may be good consideration is to be determined upon the arbitrary basis of the nature of the obligation in question: i.e. is it an obligation to pay money or to perform services?”⁴⁸

ii. Extending the practical benefit concept to part payment of debt

An alternative approach would be to find that variation agreements for part-payment of a debt *can* be found to be supported by consideration, if there are practical benefits to the creditor. In fact, it was this approach that was adopted by both the County Court judge and the Court of Appeal in this case. In *MWB v Rock* the CA found those benefits to be that MWB would recover some of the arrears immediately and would have some hope of recovering them all in due course, and secondly that Rock would remain a licensee and continue to occupy the property with the result that it would not be left standing empty for some time at further loss to MWB.⁴⁹ Arden LJ noted this point as “avoiding a void”.⁵⁰ Kitchen LJ was also able to find commercial advantage to both MWB and Rock:

“MWB derived a practical benefit which went beyond the advantage of receiving a prompt payment of a part of the arrears...this is therefore a case where, as in the *Roffey Bros & Nicholls* case, Rock’s immediate payment of £3,500 and its agreement to perform its obligations under the revised payment schedule conferred a practical benefit on MWB which amounted to good consideration, so rendering the oral variation agreement enforceable”.⁵¹

This path effectively extends the *Williams v Roffey* principle into part-payment of debt. It has a number of supporters, evidenced by some commentators welcoming the CA decision. The decision was described as a pragmatic approach,⁵² and one which pursued a commercially sensible outcome. It was seen to offer more flexibility, be less formalistic and more reflective of modern commercial practice.⁵³ Collins describes the recognition of practical benefit as sufficient consideration for a promise to accept less as “welcome”.⁵⁴ In fact in *Foakes v Beer* itself, Lord Blackburn had made the point that “all men of business...do every day ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce

⁴⁷ M. Roberts, “*MWB Business Exchange Centres Ltd: The Practical Benefit Doctrine Marches On*” (2017) 80(2) *Modern Law Review* 343.

⁴⁸ E. Peel “Part payment of a debt is no consideration” (1994) 110(Jul) *Law Quarterly Review* 353, 355.

⁴⁹ *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553 at [47].

⁵⁰ *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553 at [72].

⁵¹ *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553 at [48].

⁵² A.Shaw-Mellors & J. Poole, “Recession, changed circumstances, and renegotiations: the inadequacy of principle in English law” (2018) 2 *Journal of Business Law* 101, 106.

⁵³ S. Wilken and K. Ghaly *The Law of Waiver, Variation, and Estoppel*, 3rd edn (Oxford: Oxford University Press, 2012) cited in A.Shaw-Mellors & J. Poole, “Recession, changed circumstances, and renegotiations: the inadequacy of principle in English law” (2018) 2 *Journal of Business Law* 101, 107.

⁵⁴ D. Collins “Part-payment of debt: a variation on a theme?” (2017) 28(7) *International Company and Commercial Law Review* 253, 258.

payment of the whole”.⁵⁵ The *Williams v Roffey* decision itself was welcomed by many commentators as the previous approach of the pre-existing duty doctrine was felt to be too “blunt” and “indiscriminate” and ran the risk of denying legal force to many freely negotiated modifications,⁵⁶ suggesting that any development into modifications to pay less would be welcomed.⁵⁷ The principles of economic duress were thought to offer a more sophisticated means of distinguishing extorted and non-extorted modifications. The extension of *Williams v Roffey* represents an attractive solution as it avoids the current distinction between promises to pay more and promises to accept less that has been described as difficult to justify conceptually. Interestingly, Arden LJ in the CA identified practical benefit as “replacing the word ‘the gift of a horse, hawk, or robe’ with a more modern equivalent”,⁵⁸ intimating that the introduction of practical benefit to variations to pay less could be as simple as updating the terminology.

However, in the SC Lord Sumption indicated the introduction of practical benefit to these types of variations would have a much more substantial impact on the law, and in particular, on *Foakes v Beer*.

“In *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, the Court of Appeal held that an expectation of commercial advantage was good consideration. The problem about this was that practical expectation of benefit was the very thing which the House of Lords held not to be adequate consideration in *Foakes v Beer* (1884) 9 App Cas 605...The reality is that any decision on this point is likely to involve a re-examination of the decision of *Foakes v Beer*”.⁵⁹

It seems therefore that this approach is unlikely to be seen as merely updating terminology and more likely to be recognised as, at the very least, substantially modifying the decision in *Foakes v Beer*. We would suggest that this path does not necessarily require overruling *Foakes v Beer*, in much the same way that *Williams* did not require *Stilk v Myrick* to be overruled. In fact, *Foakes v Beer* would need to be retained to deal with the situation where the benefit was solely payment of some of the arrears.

However, it is important to recognise that to apply practical benefit to part payment of a debt would be an extension of what was envisaged by *Williams v Roffey* and therefore represents a significant development in the law.⁶⁰ In *Williams v Roffey*, Glidewell LJ outlined six propositions for the concept to apply, the first of which requires if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B.⁶¹ This suggests that to find practical benefit and therefore consideration in a promise to pay less than owed, would be a significant extension of the law. Arguably, the two situations (one involving goods and services, the other involving part payment of money) can be distinguished and therefore situations such as *Williams* can

⁵⁵ *Foakes v Beer* (1884) 9 App Cas 605 HL at [622]. The Law Revision Committee in 1937 noted the validity of this view.

⁵⁶ R. Halson, “Sailors, sub-contractors and consideration” (1990) 106 *Law Quarterly Review* 184.

⁵⁷ A. Boon Leong Phang, “Consideration at the crossroads” (1991) 107(Jan) L.Q.R. 21, 22 “... the dispensation with the concept of legal benefit or detriment in *Williams v Roffey Bros* is desirable in as much as the concept entails ‘an error of logic’”. See also R. Halson, “Sailors, sub-contractors and consideration” (1990) 106 *Law Quarterly Review* 184.

⁵⁸ *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553 at [85].

⁵⁹ *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 at [18].

⁶⁰ Counsel for the appellant made this point about *Williams v Roffey* in the Supreme Court: *MWB v Rock Advertising*, UKSC 2016/0152 at the hearing 1 February 2018.

⁶¹ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1 CA (Civ Div) at [15-16].

be distinguished from scenarios such as *Re Selectmove*.⁶² Counsel for the appellant in the SC hearing persuasively made this point, referring to it as the “arithmetic” point, which argues that if consideration must be something of value, then payment of a smaller sum cannot be good consideration. Conversely, this can be distinguished from a *Williams v Roffey* scenario which involves good and services, whereby it is possible to arrive at a practical benefit representing something of value, in that case avoidance of a penalty clause.

A potential problem with this extension is that it simply creates a new distinction between those part payment situations which strictly part pay a debt and those whereby there can be found to be some practical benefit. This new distinction would arise between different types of part payment situations rather than between promises to pay more/accept less. Therefore, extending practical benefit into part payment of debt simply replaces one definite distinction with a particularly fine one. A passage from the judgment at first instance in *MWB v Rock* highlights this point, with Judge Moloney QC stating:

“There is just enough practical benefit here to [MWB] constitute adequate consideration passing in its direction, even though it is fair to say it is doing no more than accepting payments of moneys that [Rock] was contractually obliged to pay in any event (whether as licence fees for the future or payment of arrears in the past). Still, there is some consideration in this situation in the benefits of having some of one’s debtors’ obligations honoured and some hope of having them all honoured rather than abandon hope entirely.”⁶³

This indicates that if there is some hope of having the full debt honoured there is a practical benefit, whereas if there is no hope then there is not. This approach simply creates a new distinction between part-payments that are enforceable as a result of practical benefit and those that are not.⁶⁴ If the law goes further and finds practical benefit solely in having some of a debtor’s obligations honoured, then surely this would mean every variation would be capable of amounting to consideration, which effectively abandons the need for consideration in variation contracts without explicitly saying so.

Another area of concern with this approach is the lack of certainty it creates for the commercial world. Imagine a scenario where party A owes party B and C. Party A is in difficulty in both cases and party B and C agree to accept less. Party B experiences some practical benefit from this variation of the original contract (perhaps keeping a building occupied) whilst party C does not. If the practical benefit doctrine is applied, party A’s variation with B will be enforceable as there will be consideration, and the one with C will not. Counsel for the appellant cautioned that this could lead

⁶² Arguably this point is cemented by the fact that neither *Pinnel’s* case, nor *Foakes v Beer* were cited in *Williams v Roffey*.

⁶³ *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553 at [10] references the judge at first instance at [20]. The reasoning appears a little muddled here. The judge refers to enough practical benefit to constitute adequate consideration, yet the court is not concerned with adequacy - in fact the consideration need not be adequate, but it must be sufficient.

⁶⁴ This new distinction and its associated problems are discussed in commentary on the CA decision in *MWB*: M. Roberts, “*MWB Business Exchange Centres Ltd*: The Practical Benefit Doctrine Marches On” (2017) 80(2) *Modern Law Review* 343.

to a plethora of cases exploring what is practical benefit in this situation and what is not, which could lead to unwelcome commercial uncertainty.⁶⁵

A further issue would be the impact this approach would have on other doctrines, notably economic duress, promissory estoppel and potentially NOM clauses. If the courts are able to apply the practical benefit concept to variations that pay less than owed, it is reasonable to assume that more cases would be found to be supported by the necessary consideration. This shifts the emphasis onto the assessment of whether there has been any economic duress⁶⁶ (as in fact it did in *Williams v Roffey*⁶⁷). Whilst some commentators welcome the shift of emphasis to duress as a result of the practical benefit concept⁶⁸, the possible problem with this is that the economic duress doctrine is thought to be a developing one, with uncertain boundaries as discussed below. Another effect would be to reduce the significance of promissory estoppel as presumably in *Central London Property Trust v High Trees House Ltd*⁶⁹ the court would have been able to find a practical benefit in having the flat occupied during the war. A further impact, again argued by the counsel for the appellant, would be on NOM clauses themselves, in that if the court is more likely to find consideration, then the need for a NOM clause becomes greater (although this point is arguably less forceful given the SC's approval of NOMs in the *MWB* decision).

A final point is that many commentators question whether applying the principle in *Williams v Roffey* and overturning *Foakes and Beer* is going far enough, noting that a test of practical benefit may be difficult to apply in some cases and that "concentration solely on the issue of consideration would fail to address the real problem of distinguishing between those renegotiated contracts which should be enforced and those which should not."⁷⁰

iii. Elevation of the doctrine of duress

As mentioned above, another potential solution in respect of contractual modifications is to remove the requirement of consideration and thus avoid the tautologous findings on 'practical benefit'.⁷¹ The idea of economic duress stepping in here is not a new one and has been discussed at length in relation to the *Williams v Roffey* decision and subsequently, and has support amongst commentators.⁷² Allowing economic duress to effectively police contractual modifications would

⁶⁵ D. Collins "Part-payment of debt: a variation on a theme?" (2017) 28(7) *International Company and Commercial Law Review* 253, 255 comments that the CA decision in *MWB v Rock* "compromised on certainty in transactional interpretation".

⁶⁶ R. Halson, "Sailors, sub-contractors and consideration" (1990) 106 *Law Quarterly Review* 184: "In so far as a test of factual consideration is more easily satisfied than one requiring legal consideration, it is the presence or absence of duress which will ultimately determine the enforceability of a modification. Thus the principles of economic duress are pushed to the fore".

⁶⁷ The lack of duress was also important in the *MWB v Rock* case at CA stage with Kitchen LJ noting that there was no suggestion that *MWB* was at any material time operating under any kind of duress.

⁶⁸ R. Halson, "Sailors, sub-contractors and consideration" (1990) 106 *Law Quarterly Review* 184.

⁶⁹ *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.

⁷⁰ E. Peel, "Part payment of a debt is no consideration" (1994) 110(Jul) *Law Quarterly Review* 353, 355.

⁷¹ Reynolds and Treitel, "Consideration for the Modification of Contracts" (1965) 7 *Malaya Law Review* 1, discussed in B. Coote, "Consideration and variations: a different solution" (2004) 120 *Law Quarterly Review* 23.

⁷² See e.g. Peel who stated that this "would be a more sophisticated approach than that provided by the consideration-based approaches of either *Selectmove* or *Williams v Roffey*, under which bona fide renegotiations would be enforceable whereas those obtained by exploitation would not." E. Peel "Part payment of a debt is no consideration" (1994) 110(Jul) *Law Quarterly Review* 353-356.

mean that variations would be binding provided there was no duress, a point specifically noted in *Williams v Roffey*, which stipulated that the requisite 'practical benefit' would not have been found had duress been present.⁷³ Those cautioning against such a move note that the doctrine is relatively recent in the law of contract. Writing on *Williams v Roffey* in 1991, Phang, whilst in favour of this proposition, noted that "the doctrine is still in its infancy, and one hopes that the courts will be able to develop more concrete guidelines in future cases."⁷⁴ Twenty-seven years later the question may be whether or not there are more concrete guidelines or it may be whether this is necessary, given that we have an established body of case law which sets out considerations for the court when evaluating whether there has been economic duress, with the *Pao On* 'coercion of the will' approach having shifted towards the question of whether there was a practical alternative.⁷⁵

Whilst the question of 'lawful act duress'⁷⁶ does not seem to have been resolved, this may not preclude economic duress from stepping into the role of policing contractual modifications. In an article where the title speaks for itself 'Economic duress: an elegant and practical solution', Ogilvie, considering the Canadian position, suggests that the difficulties with the doctrine are

"largely because it has been assumed to be concerned with other concepts which are not easily understood or defined such as agreement, consent, coercion, illegitimacy and illegality"⁷⁷

Finding much merit in the Canadian Court of Appeal decision *Greater Fredericton Airport Authority Inc v NAV Canada*⁷⁸, where the court undertook an extensive review of English and Canadian case law, Ogilvie favours this pared back test for economic duress generally and which could be utilised for contractual modifications, namely that economic duress will only be found where the party under duress has no practical alternative but to agree to the demand. Her view that evidence of market conditions and the complainant's situation can "easily" be gathered and that this simple "factual test" is "workable and should yield fair outcomes", is certainly an appealing one.⁷⁹

Similarly, Coote, considering the New Zealand position as set out in *Antons Trawling Co Ltd v Smith*⁸⁰, notes the merits of doing away with consideration entirely in contractual variations, stating that "The importance of consideration is as a valuable signal that the parties intend to be bound by their agreement, rather than an end in itself."⁸¹ Acknowledging the possible use of duress and fraud to control such variations and ensure that a party could not purposely underprice a contract to secure the work and then seek to obtain higher payment for it, he notes that the New Zealand court has

⁷³ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1; [1990] 1 All ER 512 per Lord Glidewell at [16].

⁷⁴ A. Boon Leong Phang, "Consideration at the crossroads" (1991) 107(Jan) *Law Quarterly Review* 21, 22.

⁷⁵ There is not scope here for a full discussion of the case law on economic duress but see e.g. *Pao On v Lau Yiu Long* [1980] AC 614; [1979] 3 All ER 65; *North Ocean Shipping Co v Hyundai Construction, The Atlantic Baron* [1978] 3 All ER 1170; *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419; *Atlas Express v Kafco* [1989] QB 833.

⁷⁶ *CTN Cash and Carry Ltd v Gallaher* [1994] 4 All ER 714 and recently considered in *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2017] EWHC 1367 (Ch).

⁷⁷ M.H. Ogilvie, "Economic duress: an elegant and practical solution" (2011) 3 *Journal of Business Law* 229, 242.

⁷⁸ *Greater Fredericton Airport Authority Inc v NAV Canada* (2008) 290 D.L.R. (4th) 405 (CA (NB)).

⁷⁹ M.H. Ogilvie, "Economic duress: an elegant and practical solution" (2011) 3 *Journal of Business Law* 229, 242.

⁸⁰ *Antons Trawling Co Ltd v Smith* [2003] 2 N.Z.L.R. 23 (CA (NZ)).

⁸¹ B. Coote, "Consideration and variations: a different solution" (2004) 120(Jan) *Law Quarterly Review* 19, 21.

gone further in stating that other “policy reasons” could prevent a variation from being binding. Coote suggests that this could be applied flexibly in situations where conduct falls short of duress or fraud but is for example contrary to good faith.

The New Zealand approach would present obvious difficulties for the English courts, particularly given the reluctance to adopt a good faith requirement⁸² and it is suggested that the approach Ogilvie favours would be far more acceptable. Adopting the doctrine of economic duress to police contractual modifications is not without difficulty though. However attractive a pared back test seems, there remain inherent difficulties. Shaw-Mellors suggests that if we accept a shift from consideration to duress “it is imperative that duress be clearly defined and delineated. It has not been.”⁸³ He also highlights the difficulties with a potential two-stage approach as set out in *Williams v Roffey*, that the party seeking to establish consideration in the form of practical benefit would have to prove that it did not exercise duress, which presents obvious evidential difficulties.⁸⁴ Shaw-Mellors also highlights the problem with rescission and the well-established bars, which could result in the injured party left without a remedy as seen in *The Atlantic Baron*.⁸⁵ To the argument that a party should act quickly if they had agreed to modification under duress, he notes that the delay may be as a result of the duress itself. A possible solution to this is that a finding of duress could extend to the delay itself and that delay in itself would not necessarily invoke the bar of affirmation. This does suggest the need for further guidance from the courts though and an extensive review of the case law on economic duress specifically in the area of contractual variations would be welcome. We would suggest however that this is a pathway which merits further exploration by the courts and that the argument that the doctrine is in its infancy cannot last forever. No doctrine has arrived ‘fully grown’ and the common law is arguably sophisticated enough to formulate sufficient precision for economic duress to play a key role in this area.

This section has considered three potential ways forward for dealing with contractual variations. However, it is important to note that commentators have discussed a number of other options. One example of this would be to overrule *Williams v Roffey* and return to the more traditional doctrine of *Stilk v Myrick*, that promises to pay more for a pre-existing contractual obligation cannot amount to good consideration. We have already noted that *Williams v Roffey* has been criticised in subsequent case law, such as *South Caribbean Trading*. It is therefore true to say that the decision on practical benefit has not been universally accepted.⁸⁶ Indeed, Donaldson J in *Adam Opel* questioned the logical coherence of the decision⁸⁷ and commentators have questioned whether a court of final

⁸² The issue does not seem to have progressed since *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) when Leggatt J suggested that in failing to recognise a requirement of good faith, “this jurisdiction would be swimming against the tide” at 124.

⁸³ A. Shaw-Mellors & J. Poole, “Recession, changed circumstances, and renegotiations: the inadequacy of principle in English law” (2018) 2 *Journal of Business Law* 184.

⁸⁴ A. Shaw-Mellors & J. Poole, “Recession, changed circumstances, and renegotiations: the inadequacy of principle in English law” (2018) 2 *Journal of Business Law* 184 propose an interesting solution of using the “hardship” mechanism found within the UNIDROIT Principles of International Commercial Contracts, 4th edn, 2016 for contract renegotiations, but notes that the approach is likely to be too interventionist for the English courts, p119-121.

⁸⁵ *North Ocean Shipping Co v Hyundai Construction, The Atlantic Baron*, [1979] QB 705; [1978] 3 All ER 1170.

⁸⁶ D. Collins, “Part-payment of debt: a variation on a theme?” (2017) 28(7) *International Company and Commercial Law* 255.

⁸⁷ *Adam Opel GmbH v Mitras Automotive (UK) Ltd Costs* [2007] EWHC 3481 (QB).

appeal could approve its reasoning without compromising the doctrine of consideration.⁸⁸ However, in the SC Lord Sumption discussed the possibility of re-examining *Foakes v Beer* rather than *Williams v Roffey* per se, so we have focussed this article on more likely ways forward.

Another possible path forward would be to remove consideration as a contractual requirement completely i.e. not just for modification of contracts (discussed above). It is fair to say that the doctrine of consideration has not been universally approved. Phang has questioned whether the doctrine of consideration is even necessary.⁸⁹ McKendrick highlights several difficulties with doctrine, including the fact that it has become extremely technical and is divorced from commercial reality.⁹⁰ Indeed, in the *Rock v MWB* case itself, Lord Sumption commented during the hearing that “[The] doctrine of consideration is a difficult doctrine, which one certainly wouldn’t reinvent as part of English law if starting from scratch”.⁹¹ However, the most pressing argument against removal of consideration is that other doctrines would need to be in place to test for enforceability of contracts and whilst there are arguments in favour of abolishing consideration and elevating the doctrine of duress doctrine in variations, we would contend that these arguments are less convincing in relation to formation.

Commercial implications of this decision

i. use of Non Oral Modification clauses:

It seems that this decision brings commercial certainty to the area of NOM clauses in that businesses can have confidence that a well-drafted clause will avoid the difficulties of a disputed modification and the need to ascertain the authority of those authorising the purported modification. Lord Bridge’s analogy with subject to contract negotiations discussed above seems a sensible one, with any proposed modifications returning to the key decision makers who can then decide to vary the contract according to the NOM clause or not. From a practical perspective, it would be advisable for the relevant employees to know about the clause but that should not present difficulties. Increased certainty in this area does not solve the issue of modification under duress, however potentially the requirement for recording a modification formally could mitigate the possibility of ‘on the spot’ acquiescence under duress, by giving ‘breathing space’ and time to raise concerns and seek legal advice.

ii. Practical benefit in agreements to accept less or later:

As discussed above the lower court and CA agreed that there was ‘practical benefit’ in this case, though not as widely drawn as per *Williams v Roffey*. Given that the SC did not decide on this point, this presents difficulties from a commercial perspective and future decisions are likely to be decided on a fact specific basis. Although this may increase flexibility, this does seem to be at the expense of certainty. Perhaps a ‘belt and braces’ approach is advisable i.e. a NOM clause and specifying particular consideration, even if nominal, rather relying on ‘practical benefit’ as per the CA decision in *MWB v Rock*. A problem with this though is that, whilst large organisations with legal advisors will no doubt be aware of the consideration requirement, small organisations most likely will not,

⁸⁸ J. O’Sullivan, “Unconsidered modifications” (2017) 133 *Law Quarterly Review* 191, 197.

⁸⁹ A. Boon Leong Phang, “Consideration at the crossroads” (1991) 107(Jan) *Law Quarterly Review* 21, 22.

⁹⁰ E. McKendrick, *Contract Law. Text, cases, and materials*, 5th edn (Oxford: Oxford University Press, 2016), pp.146-147.

⁹¹ Lord Sumption, *MWB v Rock Advertising*, UKSC 2016/0152 at the hearing 1 February 2018.

potentially resulting in a continuation of a post-facto analysis of events and intentions in disputes regarding contractual modifications.

Linking the implications above together, it may be that the decision in *Rock v MWB* in the SC means that the resounding approval of NOM clauses lessens the problems with consideration in contract variation. The reason for this is that if a variation has been made, and the original contract had a NOM clause in it, then the variation may not be valid because it has not complied with the formalities required by the NOM clause - there would be no need to cover the consideration issue (as in fact happened in *Rock v MWB* itself in the SC). It may mean that the spotlight falls more on whether there is a NOM clause in place in the future, rather than the more detailed technical questions about consideration. The consideration point however, will continue to arise where there is no NOM clause or where a variation is made in accordance with the NOM clause but where the consideration for the variation has not been expressly stipulated and is later challenged.

Conclusions

The ruling on enforceability of NOM clauses is emphatic and, whilst future case law will need to be monitored, this does *prima facie* seem to have settled this issue. However, as has been noted here and elsewhere, the law in relation to the consideration/practical benefit issue remains in a state of flux. Collins, whilst welcoming the CA decision in *MWB v Rock*, notes “practical benefit is not a legal panacea, and its precise composition and sustainability in law remains unclear.”⁹² As we and many others have discussed, there does not appear to be one obvious solution to the problem and lack of clarity remains following the SC court decision. This begs the question of when the area, which Lord Sumption suggested was “a difficult one” and “probably ripe for reexamination”⁹³, will next come before a fully constituted panel, why, knowing the issues, this was not heard before such a panel and indeed why a fully constituted panel is necessary, given that there have been reviews on key contract law issues without.⁹⁴ As Lord Sumption notes in the opening paragraph, this appeal was “exceptional”. Regrettably, in respect of the consideration point, the judgment was not.

⁹² D. Collins, “Part-payment of a debt: a variation on a theme” (2017) 28(7) *International Company and Commercial Law Review* 253, 258.

⁹³ *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 at [18].

⁹⁴ See e.g. *Shogun Finance Ltd v Hudson* [2003] UKHL 62; [2004] 1 All ER 215 which, although subject to much academic criticism, did review the area of unilateral mistake.